92-1184
Case No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

FRANK ARENELLA, JR.,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHEN THE INEFFECTIVENESS OF PRIOR COUNSEL IS RAISED BY SUBSEQUENT COUNSEL FOR THE FIRST TIME ON DIRECT APPEAL, MUST THE CASE BE REMANDED FOR HEARING ON INEFFECTIVENESS OF PRIOR COUNSEL IF THE RECORD ON DIRECT APPEAL SHOWS *PRIMA FACIE* EVIDENCE OF INEFFECTIVENESS OF PRIOR COUNSEL?

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TABLE OF AUTHORITIES

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) Page 23

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State v. VanCleave, 239 Kan. 117, 716 P.2d 580 (Kan. 1986) Page 11

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

1. Order of the Trial Court dated April 7, 1989 (Court of Common Pleas of the 26th Judicial District of Pennsylvania, Columbia County Branch)
   44 of 1988 Columbia County

   Set forth in full at Appendix Page

2. Trial Court Opinion dated August 29, 1989
   44 of 1988 Columbia County

   Set forth in full at Appendix Page

3. Superior Court of Pennsylvania Memorandum Opinion and Order of October 18, 1990
   01120 Philadelphia 1989, 407 Pa. Super. 641, 584 A.2d 1044 (1990)

   Set forth in full at Appendix Page

4. Superior Court of Pennsylvania Memorandum Opinion and Order of September 10, 1991
   01120 Philadelphia 1989, ____ Pa. Super. ____, 601 A.2d 367 (1991)

   Set forth in full at Appendix Page

5. Trial Court Opinion on Remand with Order dated November 7, 1990
   44 of 1988 Columbia County

   Set forth in full at Appendix Page

6. Order Denying Allowance of Appeal by the Supreme Court of Pennsylvania of April 21, 1992
308 M.D. 1991, 529 Pa. 667, 605 A.2d 332 (1992)

Set forth in full at Appendix Page

7. Order Denying Reconsideration by the Supreme Court of Pennsylvania of October 8, 1992
308 M.D. 1991, ____ Pa. ____, 614 A.2d 1138 (1992)

Set forth in full at Appendix Page

STATEMENT OF GROUNDS OF JURISDICTION

The Pennsylvania Supreme Court on October 8, 1992 denied reconsideration of its April 22, 1992 Order, which denied Allowance of Appeal and was served on Petitioner on April 23, 1992. The Request to Reconsider was filed on April 30, 1992.

The Petition for Allowance of Appeal and Reconsideration filed and denied in the Supreme Court of Pennsylvania raised the issue of ineffectiveness of counsel, a federal constitutional issue, pursuant to the Sixth Amendment, made applicable to the states by the Fourteenth Amendment.

Statutory Jurisdiction is raised under 28 U.S.C §1257(a) which allows the filing of this Petition for a Writ of Certiorari and is set forth verbatim at page 5 herein.

CONSTITUTIONAL PROVISION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States.

STATUTE

§1257. State courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Public Law 91-358 as amended July 29, 1970, Title 1 §172(a)(1), 84 Stat. 590; Public Law 100-352 §3, June 27, 1988, 102 Stat. 662, 28 U.S.C.A. §1257.

STATEMENT OF THE CASE

Frank Arenella for the first time raised the issue of ineffectiveness of trial counsel when he filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, see Appendix page Ap 45. This claim of ineffectiveness was raised at the first level of direct appeal where new counsel represented Mr. Arenella and based on the face of the record, the claim of ineffective assistance is solidly supported. Supported to the extent that evidence of the claim makes a finding of ineffective assistance of counsel more-likely-than-not should this case be remanded for an evidentiary hearing.

Despite these facts, the Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal on April 22, 1992. This Denial was served on April 23, 1992 and on April 30, 1992 when, based on a

recent Supreme Court of Pennsylvania Opinion, reconsideration was requested, this too was denied on October 8, 1992, see Appendix page Ap 43.

Frank Arenella was accused of delivering 6.7 grams and 2.2 grams of cocaine on June 22 and July 20, 1987 respectively to an Informant Robert Builder. A search of Mr. Arenella's home resulted in the seizure of 774.5 grams of marijuana, two (2) tablets of LSD, 0.5 grams of methamphetamine, 36.5 grams of cocaine and various items of drug paraphernalia.

At trial, Mr. Arenella defended on the theory that Informant Builder (desperate to provide evidence of a crime to save himself) discovered on June 22, 1987 that the Arenella family was leaving on June 22nd for Florida and would not return until about July 20, 1987, see Notes of Testimony quoted herein at pp. 27. Informant Builder even told Trooper

Howel of Mr. Arenella's vacation, see p 32.

Further, Mr. Arenella testified that while he did possess the six (6) grams of marijuana found in his suitcase, he did not know that the 774 grams of marijuana (bags of marijuana), two (2) tablets of LSD, 0.5 grams of methamphetamine or 36.5 grams of cocaine were in his house, see pp. 30-31. Mr. Arenella testified that these drugs were found in his basement. He denied delivering cocaine to Informant Builder on either June 22 or July 20, 1987, see, p. 28. The jury was asked to infer that these "basement" drugs were planted when Mr. Arenella's family was in Florida.[1]

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[1]Although it is not being argued herein the jury never heard available testimony not offered at trial that a College Professor who was a friend of the Arenella's knew they were in Florida over the 4th of July, saw suspicious lights in the Arenella home basement. He was suspicious enough to stop, but failed to investigate further. See Appendix pages Ap 39-41. Trial Court Opinion of November 7, 1990.

Mr. Arenella was convicted on all of the previously described drug charges and sentenced to four to eight years.

At trial, prior counsel failed to object to Informant Builder's testimony because he had requested and not been provided Informant Builder's criminal record, plea bargain terms, and outstanding criminal charges known to the prosecutor, see Appendix page Ap 28. This failure to object and preserve for appeal is clear in the record. There are also strong indications in the record that Informant Builder had committed other offenses known to authorities, had a deal to testify and had carefully not been charged with any crimes in Columbia County, see pp. 33-35. Certainly, there is strong evidence in the record of other crimes known to the prosecutor or Investigating Trooper Howel that remain unprosecuted at the time of Informant Builder's testimony.

Mr. Arenella was also convicted of possession with the intent to deliver (a felony) two (2) tablets of LSD and 0.5 grams of methamphetamine based on evidence that on the record is strongly shown as likely insufficient, see pp. 36-37.

ARGUMENT

The state courts of highest jurisdiction are without guidance in determining if a claim of Constitutional ineffectiveness may be raised initially on appeal. The state courts of last resort are divided on two issues. First, may ineffectiveness of trial counsel be raised initially on appeal? A small group of state courts of last resort hold that ineffectiveness may never be raised on direct appeal unless it has been raised and addressed by the trial court.[1] Another small group of state courts of last resort hold that ineffectiveness may be raised initially on appeal and decided to avoid a

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[1] Harrison v. State (Ark.) 303 Ark. 247, 796 S.W. 2d 329 (1990); State v. Tsethlikai, 109 N.M. 371 (New Mexico App) 785 P.2d 282 cert. denied 109 N.M. 262, 784 P.2d 1005 (1989) citing, State v. Lujan, 79 N.M. 200 (New Mexico), 441 P.2d 497 (1968); and State v. VanCleave, 239 Kan. 117, 716 P.2d 580 (1986).

"plain error" or miscarriage of justice.[2] A third larger group of state's courts of last resort permit a claim of ineffectiveness raised for the first time on appeal--sometimes.[3] Others always permit ineffectiveness to be raised initially by new counsel on direct appeal.[4]

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[2]These cases and states are (S.D. 1987), State v. Aliberti, 401 N.W. 2d 729 (plain error) and (Mass. 1987), Commonwealth v. Reid, 400 Mass. 534, 511 N.E. 2d 331 (prevent miscarriage of justice).

[3]Blanco v. Wainwright (Florida) 507 So.2d 1377 (1987), (Generally ineffective assistance is not cognizable on appeal.) Antunovich v. State, 491 So.2d 328 (Florida App. 1 Dist. 1986). (Issue of ineffective assistance of counsel cannot be raised for the first time on appeal unless sufficient facts are of record to allow determination.)

[4]People v. Angelakos, 518 N.Y.S. 2d 784, 70 N.Y. 670, 512 N.E. 2d 305 (N.Y. 1987). (Court may consider ineffectiveness even though it was not raised below and in doing so must review the record); People v. Babbit, 45 C.3d 660, 755 P.2d 253 (Calif. 1988) cert. denied, Babbit v. California, 488 U.S. 1034, 109 S.Ct. 849, 102 L.E.2d 981 (Court may consider ineffectiveness in failing to object to closing argument

Continued on page 13

The problem facing the highest courts of Florida, New York, California and Pennsylvania is: if constitutional ineffectiveness may be raised for the first time on appeal--what then? Must all cases in which ineffectiveness is properly raised on direct appeal be remanded for a hearing in the trial court on the issue of ineffectiveness? Certainly, such a holding by this Honorable Court would occupy considerable state trial court time. The bare allegation of ineffectiveness of trial counsel by new appellate counsel would delay the direct appeals of these cases for at least a year. However, there must be cases on appeal where the

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Footnote 4 Continued from Page 12

raised on appeal); Commonwealth v. Fassett, 496 Pa. 529, 437 A.2d 1166, 1168 (Pa. 1981) (Ineffectiveness of trial counsel may be initially raised on direct discretionary appeal to the Supreme Court of Pennsylvania if it is the first stage at which there is different counsel.)

appellate record supports a prima facie showing of the constitutional ineffectiveness of trial counsel. If only those cases on direct appeal having a prima facie showing of ineffectiveness of trial counsel were remanded for an evidentiary hearing, many fewer cases would be remanded and a higher percentage of those that were would have an actual finding of ineffectiveness of trial counsel while on direct appeal.

This rule provides guidance to the state courts which cases initially alleging constitutional ineffective assistance of trial counsel must be remanded. The proper administration of justice requires a balance between two interests.

These interests are the ease and consistency which constitutional guidelines once established by this Honorable Court may be applied and do people in and

subject to the system of justice believe they have been fairly and justly treated.

It is unfortunately true that a certain percentage of persons in the criminal justice system will be convicted of crimes because they are poorly (constitutionally ineffectively) represented by their attorney. It is impossible to expect criminal Defendants to recognize ineffective assistance of counsel and raise it in trial court before their direct appeal begins.

It is fairer to expect new appellate counsel to review the past legal stewardship and raise issues of constitutionally ineffective representation. However, if the ruling by this Honorable Court was that because constitutional ineffectiveness is cognizable on collateral appeal, it would be simpler to apply a rule of law that stated: "No allegations of ineffectiveness raised on direct appeal

may be determined on direct appeal." Certainly, this would create a clear, easily applied standard for the state courts. And, all the state courts of last resort would consistently apply the federal constitution effective assistance of counsel as it applies to issues raised initially on direct appeal. All allegations of ineffectiveness of trial counsel not raised initially in the trial court would necessarily be addressed in collateral state permitted actions or federal habeas proceedings.

In any system of justice, however, those subject to it because they are accused of a crime must perceive that they are being treated fairly with justice. Certainly not in the sense that all accused Defendants praise the judicial system stating that they received just treatment in an absolute sense.

Unfortunately, many in our society are convicted beyond a reasonable doubt of a crime and will, even if treated fairly with justice, be sentenced to long periods of incarceration.

Even more unfortunately, all persons accused of a crime do not receive constitutionally effective assistance of defense counsel. This results in some persons being convicted beyond a reasonable doubt of crimes who would not have been convicted beyond a reasonable doubt had they received effective assistance of counsel.

That is the dilema facing this Honorable Court. If all allegations of ineffectiveness must be determined in a collateral proceeding, the now sentenced Defendant must begin any sentence of incarceration because they are no longer entitled to bail pending direct appeal. A sentenced Defendant may spend years

incarcerated to later have a collateral proceeding result in a finding of constitutionally ineffective assistance of counsel resulting in a new trial. After years of incarceration, the now accused Defendant may receive a new trial at which he is found not guilty because the evidence was argued to be insufficient to convict beyond a reasonable doubt.

It may well be perceived that this judicial system allowed an individual who received constitutionally ineffective assistance of counsel at his first trial was punished by being incarcerated during collateral proceedings for having (unknown to him) constitutionally ineffective assistance of counsel.

A better rule would be to remand for a hearing on ineffectiveness when 1) new counsel raises trial counsel's ineffectiveness initially on direct appeal, and 2) where the appellate record

shows a prima facie case of ineffectiveness of trial counsel.

The appellate record in this case shows at least a prima facie level of unconstitutional ineffective assistance of counsel. The issue of unconstitutional ineffectiveness of counsel was raised in the Supreme Court of Pennsylvania, see Appendix page Ap 45. Ineffectiveness in failing to obtain the "prior record, current and past plea bargains and records of any outstanding charges" known to the prosecution against Informant Builder were raised, see Appendix pages Ap 65-67.[5] See also Appendix pages Ap 69-76.

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[5]The Pennsylvania Supreme Court often refers to ineffectiveness of counsel without referring to the Sixth Amendment of the United States Constitution, but the analysis is always conducted under the Sixth Amendment, see Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967). See for example

Continued on Page 20

The issue of ineffectiveness in failing to allege insufficient evidence of an intent to deliver two (2) tablets of LSD and 0.5 grams of methamphetamine was also raised and argued, Appendix pages Ap 57-60.

At trial, Mr. Arenella defended on the theory that Informant Builder (in an attempt to save himself) planted certain drugs in his home while Mr. Arenella was in Florida. Informant Builder learned that the Arenella family was leaving for Florida on June 22, 1987 and told Trooper

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Footnote 5 Continued from Page 19

Commonwealth v. Fassett, 496 Pa. 529, 437 A.2d 1166 (1981); Commonwealth v. Pettus, 492 Pa. 558, 424 A.2d 1332 (1981); Commonwealth v. Cargo, 498 Pa. 5, 444 A.2d 639 (1982); Commonwealth v. Seachrist, 478 Pa. 621, 387 A.2d 661 (1978); but see also Commonwealth v. Jones, 391 Pa. Super. 292, 570 A.2d 1338, reargument denied, appeal denied, 596 A.2d 155 (cites Cargo, supra. and Seachrist, supra. at Jones, supra., 570 A.2d at 1344).

Howel that they would not return for about three (3) weeks, see pages 27 and 32.

Further, Mr. Arenella testified that while he did possess six (6) grams of marijuana found in his suitcase, he did not know that the 774 grams of marijuana (bags of marijuana), two (2) tablets of LSD, 0.5 grams of methamphetamine or 36.5 grams of cocaine were in his house, see pp. 30-31. Mr. Arenella testified that these drugs were found in his basement. He denied delivering cocaine to Informant Builder on either June 22 or July 20, 1987, see pp. 28-30. The jury was asked to infer that these "basement" drugs were planted when Mr. Arenella's family was in Florida.[6]

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[6]Although it is not being argued herein, the jury never heard available testimony not offered at trial that a College Professor who was a friend of the Arenellas knew they were in Florida over the 4th of July, saw suspicious lights in the Arenella home basement. He was suspicious enough to stop, but failed to investigate further. See Appendix pages Ap 39-41. Trial Court Opinion of November 7, 1990.

At trial even though he made written request for Informant Builder's criminal record, plea bargain terms, and outstanding charges known to the prosecutor, see Appendix page Ap 28, trial counsel failed to object on these grounds to Informant Builder's testimony. This failure to object and preserve for appeal is clear on the record. There are also strong indications in the record that Informant Builder had sold cocaine, p. 34, and committed other offenses known to authorities because Trooper Howel had identified him in his own investigations, pp. 36-37. Informant Builder also arguably had a "deal" to testify about Mr. Arenella, but denied it, pages 33 and 36. Whether or not Informant Builder had committed any crimes in Columbia County known to prosecutors is still a mystery. Informant Builder was asked only if he had

been arrested or charged with a crime in Columbia County, p. 34.

Informant Builder was a key witness for the Commonwealth. Failure to disclose information that may be used to impeach him or show his bias must be disclosed. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). If Informant Builder was told he would not be prosecuted for crimes known to Trooper Howel, Giglio, supra. requires their disclosure.

Mr. Arenella was also convicted of possession with the intent to deliver two (2) tablets of LSD, Count 6, and 0.5 grams of methamphetamine, see the excerpt from the presentence report, p. 39.

It is readily apparent that the quantities of these drugs are small. There was no evidence that these amounts were intended for delivery. To the

contrary, the appellate record in the form of notes of trial testimony shows that Informant Builder was never involved with transactions regarding the LSD or methamphetamine, see p. 37. Trooper Howel admitted on cross-examination that Builder had engaged with activity involving only cocaine and only evidence of possession of LSD and other substances, p. 38.

Mr. Arenella received a concurrent sentence of two and one-half to five years for intending to deliver two (2) tablets of LSD, Count Six, pp. 39-41. He received a concurrent sentence of two and one-half to five years for intending to deliver 0.5 grams of methamphetamine.

Only speculation could have permitted a guilty verdict of possession with intent to deliver two (2) tablets of LSD and 0.5 grams of methamphetamine. The very fact no challenge to the sufficiency

of the evidence of the intent to deliver two (2) tablets of LSD or 0.5 grams of methamphetamine makes it more likely that trial counsel was in other ways constitutionally ineffective.

This fact situation is a situation that should have certiorari granted in order to direct the states that when a review of the record indicates a prima facie showing of constitutional ineffectiveness that the state courts must remand such cases for an evidentiary hearing on ineffectiveness. Such a holding will limit remands for evidentiary hearings to these cases making it more likely that actual constitutional ineffectiveness did occur. Cases that don't meet such a showing would not have ineffectiveness claims determined on direct appeal.

Such a ruling makes a logical distinction to avoid years of incarceration during collateral attack for

petitioners (appellants) who can make a reasonably strong showing that they had constitutionally ineffective trial counsel, but still allow others to raise collaterally the issue of ineffectiveness while incarcerated. After remand, it would also be the time to apply the harmless error doctrine to ineffectiveness found at Satterwhite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

Prior to remand for an evidentiary hearing on ineffectiveness, the factual and legal extent of the constitutional ineffectiveness is not known and this harmless error doctrine would almost certainly apply before the complete record of ineffectiveness is developed on remand.

Respectfully submitted,

By: _____
Joseph M. Devecka
Attorney for Petitioner

FRANK ARENELLA DIRECT EXAMINATION BY TRIAL COUNSEL, MICHAEL LYNN, NOTES OF TRIAL TESTIMONY, pp. 252-253

Q. What did he say to you on that first call?

A. I didn't talk to him.

Q. You never talked to him?

A. I didn't talk to him until the 22nd.

* * *

Q. What was the discussion he had with you when you returned the call? Did he talk to you on the phone?

A. How was I doing and whatever, and said he wanted to speak to me. "How are you doing? What is happening?" You know, he wanted to stop by. I said it was not a good time. I was going on vacation.

Q. Did you tell him when you would be going away?

A. I said, "Yes, I'm leaving today."

Q. What did he say?

A. He said he wanted to talk to me. I said today wasn't a good day. That was where we left it. We were getting ready to go. He pops in anyway and came in, you know. We returned around--my

FRANK ARENELLA DIRECT EXAMINATION BY TRIAL COUNSEL, MICHAEL LYNN, NOTES OF TRIAL TESTIMONY, pp. 252-253

A. (Continued)
wife went out to get the kids food and packed up. We had a beer. We really didn't talk about anything. Just talked.

Q. Did he offer you drugs?

A. No.

Q. Did you offer him drugs?

A. No.

Q. Can you estimate how long he was in your house on that date?

A. I would say twenty minutes.

FRANK ARENELLA DIRECT EXAMINATION CONTINUED, NOTES OF TRIAL TESTIMONY p. 255

Q. What was the next time you saw him?

A. Like two days after I got back, a day after I got back.

Q. Where did you see him at?

A My house.

Q. How is it that he happened to be at your house pretty much soon after you got back? I mean like within several days after.

FRANK ARENELLA DIRECT EXAMINATION
CONTINUED, NOTES OF TRIAL TESTIMONY
p. 255

A. Again, he called me and you know said he tried to get a hold of me and you know what was going on. I said we were having friends over and picnicking. And, he wanted to stop by. I said, you know, we might be going out. And, I didn't really--I really didn't know what he wanted. Anyway, he comes by anyway and I am not home.

FRANK ARENELLA DIRECT EXAMINATION
CONTINUED, NOTES OF TRIAL TESTIMONY
p. 256

Q. When you got home from shopping, describe the circumstances that were present at your home vis-a-vis Mr. Builder?

A. His car was parked in the front of the house. I don't remember exactly. I pulled in the driveway. I got a slip and slide for the kids. The kids were out slipping and sliding and my wife and Bob and this other girl Lori were watching the kids play.

Q. Go ahead.

A. So, we had a beer and he talked about how he was going to quit coaching and starting a new job and was going to sell insurance

FRANK ARENELLA DIRECT EXAMINATION
CONTINUED, NOTES OF TRIAL TESTIMONY
p. 256

A. (Continued)
or something to that effect. I believe another friend of mine just stopped teaching. We had a couple of beers and I told him I was getting ready to finish school and I was thinking about starting a contracting business maybe. I wanted to start it myself and you know we were in the house for awhile. He was having another beer. We were in the house for a couple minutes. Then, out of the blue he was going to leave again.

Q. Boom he was gone?

A. Yeah.

FRANK ARENELLA DIRECT EXAMINATION
CONTINUED, NOTES OF TRIAL TESTIMONY,
pp. 266-267

Q. Were you or were you not on June 22 or July 20 or any time in between in knowing possession of cocaine?

A. No.

Q. Same question, marijuana?

A. Yes.

Q. How much marijuana?

A. What they found, six grams.

FRANK ARENELLA DIRECT EXAMINATION
CONTINUED, NOTES OF TRIAL TESTIMONY
pp. 266-267

Q. What about these large bags?

A. No.

* * *

Q. How about LSD?

A. No.

Q. Methamphetamine?

A. No.

Q. Unidentified residue, whatever that is?

A. No.

Q. Methamphetamine, what did you say?

A. No.

Q. Hashish?

A. No.

STATE TROOPER HOWEL CROSS-EXAMINATION
BY TRIAL ATTORNEY MICHAEL LYNN, ESQUIRE
NOTES OF TRIAL TESTIMONY, p. 126

Q. Did you hear anything about Mr. Arenella going out of town that day, the 22nd?

A. Mr. Builder informed me that he was informed by Mr. Arenella that Mr. Arenella would be going on vacation to Florida and wouldn't be around for about three weeks.

Q. When was he so informed?

A. When was he informed?

Q. When was he told?

A. On June 22, when he was there for the first time under my direction.

ROBERT BUILDER, CROSS-EXAMINATION BY
TRIAL COUNSEL, MICHAEL LYNN, ESQUIRE
NOTES OF TRIAL TESTIMONY, pp. 70-71, 80

Q. There were other people arrested when you were arrested on the 12th?

A. Right.

Q. Your testimony is that you just happened to be there?

A. I just walked in to pick up stuff I bought and paid for the night before.

Q. Quarter of an ounce?

A. Right.

Q. Why is it then you were charged and pled to possession with intent to deliver? You were buying for yourself, right?

A. I was buying for myself. They said due to the amount that it is automatically possession with intent to deliver.

Q. The docket itself seems to reflect delivery in Northumberland County?

A. I delivered to the state police. That is the only person I delivered it to.

Q. You are talking about on the 12th?

A. Right.

ROBERT BUILDER, CROSS-EXAMINATION BY TRIAL COUNSEL, MICHAEL LYNN, ESQUIRE
NOTES OF TRIAL TESTIMONY, pp. 70-71, 80

Q. Did you sell cocaine?

A. Did I sell cocaine? Yes.

ROBERT BUILDER, RE-DIRECT EXAMINATION BY ASSISTANT DISTRICT ATTORNEY, MRS. PEALER-WENZEL, ESQUIRE, NOTES OF TRIAL TESTIMONY, pp. 108-109

Q. Mr. Builder, there was some question about the charges that have been filed against you. Where were you arrested and where were those charges filed?

A. I was arrested in Mount Carmel. It was filed in Northumberland County.

Q. Have you ever been charged or arrested or charged with anything in Columbia County?

A. No.

ROBERT BUILDER DIRECT EXAMINATION BY ASSISTANT DISTRICT ATTORNEY, MRS. PEALER-WENZEL, ESQUIRE, NOTES OF TRIAL TESTIMONY, pp. 67-68

Q. Mr. Builder, you mentioned previously about being arrested for cocaine?

ROBERT BUILDER, DIRECT EXAMINATION
BY ASSISTANT DISTRICT ATTORNEY,
MRS. PEALER-WENZEL, ESQUIRE, NOTES
OF TRIAL TESTIMONY, pp. 67-68

A. Right.

Q. What was the outcome of that arrest?

A. The outcome of that arrest was I was arrested for possession with intent to deliver cocaine and I had a six-month jail sentence I just got done serving.

Q. You pleaded guilty to those charges?

A. Right.

Q. You served your jail sentence?

A. Right.

Q. Are you on parole now?

A. Right.

Q. You have already been sentenced?

A. Sentenced and finished doing my sentence.

Q. Have any promises been made to you in exchange for your testimony here today?

A. No.

STATE TROOPER HOWEL CROSS-EXAMINATION
BY TRIAL COUNSEL, MICHAEL LYNN, ESQUIRE
NOTES OF TRIAL TESTIMONY, pp. 110, 120

Q. Tell the Jury, if you will, how it is that you first came in contact with Mr. Builder?

A. I was conducting an investigation in Northumberland County and drug trafficking individuals. Mr. Builder was at one point obtaining cocaine from an individual, the guy I had that morning served a search warrant on, and, gave Mr. Builder a ride and he was arrested at that time.

Q. Was Mr. Builder at that time currently under investigation by you?

A. I had known of his activities, yes, sir.

* * *

Q. In what context did you know him? Socially, professionally, admiration at a distance?

A. Again, his name came up in an investigation that was going on over a period of maybe six or seven months. So, I made it a point that I would eyeball Mr. Builder. And, I did that so I knew who he was. When I saw him I was able to recognize him as being Robert Builder. Whether he knew me, it is quite possible we

STATE TROOPER HOWEL CROSS-EXAMINATION
BY TRIAL COUNSEL, MICHAEL LYNN, ESQUIRE
NOTES OF TRIAL TESTIMONY, pp. 110, 120

A. (Continued)
may have some mutual friends that they pointed me out to him. That's quite possible, but, I don't know that.

ROBERT BUILDER, CROSS-EXAMINATION BY
TRIAL COUNSEL, MICHAEL LYNN, ESQUIRE
NOTES OF TRIAL TESTIMONY, pp. 81-82

Q. LSD, Vitamin B-12, tea difusers, and the like, a little bit of methamphetamine. Now, were you ever involved, just by your own testimony, credible or not, but were you ever involved in any transaction with Mr. Arenella as with regard to the LSD?

A. No.

Q. Marijuana?

A. No.

Q. Methamphetamine?

A. No.

Q. Vitamin B-12?

A. No.

* * *

STATE TROOPER HOWEL, CROSS-EXAMINATION
BY TRIAL COUNSEL MICHAEL LYNN, ESQUIRE
NOTES OF TRIAL TESTIMONY, pp. 151-152

Q. Did he tell you when you talked with him that he had knowledge of Mr. Arenella or in fact engaged in activity as regard to other controlled substances other than cocaine?

A. No, sir.

Q. Was there any suspicion that Mr. Arenella, outside of what Mr. Builder was telling you, had ever been engaged in any activity regarding possession of LSD or any of those other substances you found?

A. Yes, sir.

EXCERPT FROM THE PRESENTENCE
INVESTIGATION USED AT SENTENCING

The deft. is charged in a Criminal Complaint filed 12/24/87 by Trooper Howard P. Howal of the PSP Region IV Strike Force. The deft. has specifically been convicted at jury trial of the following:

Count #1, Possession of a Controlled Substance (M) 6.7 grams cocaine.
Count #2, Delivery of a Controlled Substance (F) 6.7 grams cocaine.
Count #3, Possession of a Controlled Substance (M) 2.2 grams cocaine.
Count #4, Delivery of a Controlled Substance (F) 2.2 grams cocaine.
Count #5, Possession with Intent to Deliver a Controlled Substance (F) 774.5 grams Marijuana.
Count #6, Possession with Intent to Deliver a Controlled Substance (F) 2 tablets LSD.
Count #7, Possession with Intent to Deliver a Controlled Substance (F) 0.5 grams Methamphetamine.
Count #9, Possession with Intent to Deliver a Controlled Substance (F) 36.5 grams cocaine.
Count #10 Possession of Drug Paraphernalia (M) Ohaus Scale, Mannitol and Inosital (cutting agents for controlled substances), plastic packets for packaging controlled substance.

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF COMMON PLEAS OF THE 26th JUDICIAL
vs.	: DISTRICT OF PA.
FRANK J. ARENELLA, JR.,	: COLUMBIA COUNTY BRANCH : No. 44--1988 : Charge: Delivery of a Controlled Substance, Cocaine; Possession of Controlled Substance, Cocaine; Possession with Intent to Deliver Controlled Substance; Possession with Intent to Use Drug Paraphernalia
	: IN THE SUPERIOR COURT OF PENNSYLVANIA : No. 01120 : PHILADELPHIA : Resentencing on Count Six

Rudolph L. Catalan, Esquire, Assistant District Attorney for the Commonwealth of Pennsylvania.

Michael R. Lynn, Esquire, Attorney for Defendant.

RESENTENCING

AND NOW, to wit, this 15th day of November, 1990, it is hereby DIRECTED that the Defendant pay the costs of prosecution, and undergo imprisonment in a state correctional institution for an indeterminate period of not less than two-and-a-half years, nor more than five years, with said jail sentence to run concurrent to the jail sentence imposed to case number 44--1988, count two.

BY THE COURT:

/s/Hon. Gailey C. Keller,
Judge

COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF
	: COMMON PLEAS OF
	: THE 26th JUDICIAL
vs.	: DISTRICT OF PA.
	:
FRANK J. ARENELLA, JR.,	: COLUMBIA COUNTY
	: BRANCH
	: No. 44--1988
	:
	: Charge: Delivery
	: of a Controlled
	: Substance,
	: Cocaine;
	: Possession of
	: Controlled
	: Substance,
	: Cocaine; Posses-
	: sion with Intent
	: to Deliver
	: Controlled
	: Substance;
	: Possession with
	: Intent to Use
	: Drug
	: Paraphernalia
	:
	: IN THE SUPERIOR
	: COURT OF
	: PENNSYLVANIA
	: No. 01120
	: PHILADELPHIA
	: Resentencing
	: on Count Seven

Rudolph L. Catalan, Esquire, Assistant District Attorney for the Commonwealth of Pennsylvania.

Michael R. Lynn, Esquire, Attorney for Defendant.

RESENTENCING

AND NOW, to wit, this 15th day of November, 1990, it is hereby DIRECTED that the Defendant pay the costs of prosecution, and undergo imprisonment in a state correctional institution for an indeterminate period of not less than four years, nor more than eight years, with said sentence to run concurrent to the sentence imposed to case number 44--1988, count two.

BY THE COURT:

/s/Hon. Gailey C. Keller, Jr.

92-1184

Supreme Court, U.S.
FILED
JAN 6 1993
OFFICE OF THE CLERK

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 1992 Term

FRANK ARENELLA, JR.,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Joseph M. Devecka
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Counsel for Petitioner

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COMMONWEALTH OF PENNSYLVANIA	: IN THE COURT OF COMMON PLEAS OF THE 26th JUDICIAL DISTRICT OF
vs.	: PENNSYLVANIA : COLUMBIA COUNTY BRANCH
FRANK J. ARENELLA, JR.	: NO. 44--1988 :
	: MOTION FOR NEW TRIAL AND MOTION IN ARREST OF JUDGMENT
	: MOTION FOR NEW TRIAL AND MOTION IN ARREST OF JUDGMENT BASED ON AFTER DISCOVERED EVIDENCE.

Deanna Pealer-Wenzel, Esquire, Assistant District Attorney for the Commonwealth of Pennsylvania.

Michael R. Lynn, Esquire, Attorney for Defendant.

ORDER OF COURT

Upon consideration of the Defendant's motions for new trial and in arrest of judgment, and upon the Defendant's motion for new trial and in arrest of judgment based on after discovered evidence, the Court finds that the matters raised prior to trial were properly considered by the

Court, and sustains the orders previously entered in this matter. The Court further finds that there was no error in the trial of the case, that the matter was fairly and properly tried by competent counsel, and that the motions for new trial and in arrest of judgment based on after discovered evidence is also without merit, and therefore, the Court makes the following:

ORDER OF COURT

AND NOW, to wit, this 7th day of April, 1989, the Defendant's motions for new trial and in arrest of judgment, and Defendant's motions for new trial and motion in arrest of judgment based on after discovered evidence are hereby dismissed, and the Defendant is directed to appear for sentencing at 4:00 o'clock P.M., on Monday, April 10, 1989.

BY THE COURT:

/s/G. Keller, P.J.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF THE 26th JUDICIAL
vs.	:	DISTRICT, COLUMBIA COUNTY BRANCH, PA
FRANK ARENELLA, JR., Defendant	:	CRIMINAL DIVISION
	:	No. 44 of 1988

SCOTT NAUS, ESQUIRE, Attorney for the Commonwealth

MICHAEL R. LYNN, ESQUIRE, Attorney for Defendant

OPINION

August 29, 1989, Keller, J.

The Defendant was charged by information with two (2) counts of possession of cocaine, two (2) counts of delivery of this cocaine, five (5) counts of possession with intent to deliver marijuana, methamphetamine, LSD, codeine and cocaine and one count of possession with intent to use drug paraphernalia. The Commonwealth in proof of these charges introduced evidence that two (2) "controlled buys" of cocaine were made by their informant, Robert Builder, the first on June 22 and the

second on July 20, 1987. As a result of these buys a search warrant was obtained and the balance of the controlled substances and drug paraphernalia were seized from Defendant's home.

Defendant defended these charges on the basis that all of the drugs and paraphernalia were planted in his home by Robert Builder and that he had not sold any cocaine to Builder but that Builder had framed him and had duped the state police.

The jury was not persuaded by the defense and returned a verdict of guilty to all counts with the exception of the count charging possession with intent to deliver cocaine.

The Defendant timely filed his motion for post-trial relief which was dismissed without opinion and Defendant was sentenced to undergo imprisonment in a state correctional institution for an indeterminate

period of not less than four (4) years nor more than eight (8) years. From this sentence, Defendant has appealed raising a number of objections in his "Concise Statement of Matters Complained of on Appeal" filed pursuant to Pa. R.A.P. 1925 (b). We will dispose of these in this opinion.

In paragraphs (1) (3) and (4) Defendant complains that his post-trial motions were decided without the opportunity to submit briefs or without argument. As noted, in the Court's order dismissing the same there was no error during the trial of the case, the matter was fairly tried and Defendant failed to raise any valid objection warranting briefs or argument. As a result, there is no merit to Defendants 1st, 3rd and 4th complaints. As to complaint number (2) there was no need for a pre-sentence investigation before the imposition of

sentence because of the number and severity of the charges for which the Defendant was found guilty. Defendant was afforded every opportunity to mitigate his circumstances and to explain his background prior to sentencing and, therefore, was not prejudiced by the lack of a presentence investigation.

(5)(6)(7)(8) and (9): The matters complained of in these paragraphs were considered and ruled upon by President Judge Meyers in his orders disposing of Defendant's omnibus pre-trial motions. Furthermore, Defendant's complaint that a "lab analysis' report" was admitted into evidence is groundless. The report itself was never offered into evidence nor was any objection ever made to any witness referring to the report during his testimony.

In paragraph 10 of his complaints Defendant objects to the admission into

evidence of the various controlled substances seized in the search of Defendant's home as well as the substances obtained at the time of the "controlled buy". At pre-trial President Judge Meyers ruled as to the legality of the search in passing upon Defendant's omnibus pretrial motion and we incorporate his opinion at this time. Since the substances were properly admitted Defendant's 11th complaint that they were allowed to be displayed to the jury is without merit.

It should be noted once again at this juncture that the Defendant never denied that the items seized were "controlled substances." Defendant's defense was that he never possessed the items and that they were "planted in" his house and that Robert Builder "framed" him during the controlled buys. Therefore, the admission into evidence of these items in no way prejudiced the Defendant's defense.

Defendant complains in paragraph 12 that Robert Builder was permitted to testify even though his criminal record was not made known to the Defendant. This contention is without merit for two reasons. First, Defendant made no objections to his testimony (T. 61). Second, Robert Builder admitted on direct examination that he had a prior criminal record and was cross-examined extensively on this subject (T. 68-76). Even if the discovery rules require the Commonwealth to supply the Defendant with a witness's criminal record (we submit they do not) Defendant was not prejudiced because he was at all time totally familiar with the record and did cross-examine Robert Builder fully concerning his record.

Defendant complains that on the 1st day of trial the Court permitted an amendment to the information changing the date when the second buy was made and the

search conducted from June 22 to July 20. Pa.R.Crim.P. 229 permits an information to be amended when there is a defect in the date charged provided the amendment does not charge an additional or different offense. Obviously, the change of a date does not create an additional charge nor a different offense. More importantly, the instant amendment did not surprise the Defendant. The affidavit of probable cause accompanying the complaint details the correct dates, the correct date was used at the preliminary hearing and the Defendant in his omnibus pre-trial motion paragraph 4 recites:

> "At the Preliminary Hearing, Trooper Howal testified that the conduct which gave rise to Counts I and II described above occurred on June 22, 1987 and that the conduct which gave rise to Counts III through X as described above occurred on July 20, 1987 (See pages 6-9 of the Preliminary Hearing Transcript which are attached hereto and incorporated herein by reference).

The Defendant was not prejudiced and the amendment was properly allowed.

Complaint number 14 is equally without merit. The jury in the court's opening remarks was instructed "Do not read, listen to, or watch anything about the case in newspapers or magazines on radio or television." (T. 11) This caution was repeated at each daily recess. (T. 109)

Defendant's 15th complaint deals with the fact that the court during the Good Friday and Easter weekend recess excused a juror. During the weekend recess the Court received, at home, a desperate call from one of the jurors explaining that if he failed to appear for work on Monday he would lose his job. The Court spoke with the juror's employer in an attempt to mediate the problem but was unsuccessful, since the juror had been on jury duty for the preceding week. In light of the

juror's real concern and the employer's adamant position the Court felt it had no alternative but to excuse the juror and substitute one of the alternates. Since the discharge of a juror is a matter within the sound discretion of the trial court, the substitution of an alternate did not constitute error requiring a new trial.

Alternate jurors were impaneled for the sole purpose of remedying the kind of emergency that arose. Commonwealth v. Graves, 463 A.2d 467 (1983). See: Commonwealth v. Jerry, 485 Pa. 95 (1979) and Commonwealth v. Levinson, 480 Pa. 273, 281 (1978).

In paragraph 16, 17, 19 and 20 of Defendant's matters complained of on appeal, Defendant cites as error various allegations to which no objection was ever made at trial. In paragraph 16 Defendant alleges prosecutorial misconduct during

the Assistant District Attorney's closing argument. The record, however, is devoid of any objection to the Assistant District Attorney's closing nor does the court have any recollection of any interruption by Defendant of the closing argument. We hold, therefore, that no prosecutorial misconduct occurred.

As to paragraphs 17, 19 and 20 a reading of the entire court's charge permits only one conclusion. Simply put, the charge was accurate and complete and this combined with an absence of objection raising the present complaints requires that Defendant be denied a new trial. Failure to make timely objection at trial constitutes a waiver. Commonwealth v. McIlvaine, 560 A.2d 155, 159 (1989).

In paragraph 18, Defendant charges error in the Court's instructions having to do with the testimony of Robert Builder

(T. 7). This was the only objection made to the charge at trial (T. 20). Defendant objected to that portion of the charge wherein the Court instructed the jury that they might consider the evidence of prior convictions " . . . in deciding whether or not to believe all or part of his testimony . . . " Defendant urged at trial and now that the Court should have added the word "none" so that the jury would have been instructed that they could believe "all, part or none" of Robert Builder's testimony. That portion of the charge about which the Defendant complains was taken verbatim from §4.08 D of the Pennsylvania Suggested Standard Criminal Jury Instructions. When considered in conjunction with the balance of the charge on the jury's fact finding duties it may not be considered error warranting a new trial.

Finally, the Defendant in paragraph 21 challenges the jury array. Pa.R.Crim.P.

1104 require that a challenge to the array be made five (5) days before the week the case is listed for trial and only on the grounds that the jurors were not selected, drawn or summoned in accordance with the law. Defendant challenges the panel of jurors complaining that the age group was not representative of his peers. Obviously, the Defendant is not complaining about the selection process but of this particular panel of jurors. Such a complaint does not constitute grounds for a challenge. Commonwealth v. Folino, 293 Pa. Superior Ct. 347 (1981). Defendant's objections to the array was not made until after trial in his motion for post-trial relief and by failing to timely challenge the jury array he has waived any objection he might have had. Commonwealth v. Jackson, 486 A.2d 431 (1984). There is no merit to this complaint.

In light of the foregoing, Defendant's motion for a new trial or in arrest of judgment must be denied.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	
	:	NO. 01120
FRANK J. ARENELLA, JR., Appellant	:	PHILADELPHIA 1989

Appeal from the Judgment of Sentence in the Court of Common Pleas of Columbia County, Criminal at No. 44 of 1988.

BEFORE: CIRILLO, P.J., MONTEMURO AND MONTGOMERY, JJ.

Filed: October 18, 1990

MEMORANDUM:

This appeal followed the entry of the judgment of sentence on April 13, 1989 in the Court of Common Pleas, Columbia County. Appellant raises four issues in this appeal. Three of the issues address the trial court's summary dismissal of appellant's post-verdict motions without allowing counsel the opportunity to brief the issues raised in those motions, and without allowing a hearing. The remaining issue concerns the admission at trial of certain physical evidence presented by the

Commonwealth, when that evidence was not provided to the Defendant pursuant to Rule of Criminal Procedure 305(E). For the following reasons we reverse and remand for further proceedings.

The charges against appellant arose out of two controlled drug transactions during which appellant sold cocaine to an undercover government informant, and a search of appellant's home which uncovered a large variety of controlled substances. The controlled buys were conducted as follows. First, the investigating police officer, Trooper Howal, strip searched his confidential informant to make sure that the informant was not carrying drugs or paraphernalia on his person. Next, Trooper Howal searched the informant's car. Then the informant and the police officer travelled together in the informant's car to appellant's house. The informant let Trooper Howal out of the

car within two (2) blocks of appellant's house. After he left the informant's car, the police officer watched the informant approach appellant's house. As Trooper Howal watched, the informant drove to appellant's house, made the purchase, and drove to pick up the police officer. After each of the transactions, the informant possessed cocaine that he did not have before he entered appellant's house, and he no longer had the money given to him by the police officer. Immediately after the second controlled buy, Trooper Howal obtained a warrant to search appellant's house for drugs and drug paraphernalia. The search uncovered a substantial amount and variety of controlled substances, and much drug paraphernalia. The charges against appellant stem from the two (2) transactions, and from the search of his home.

Appellant, through counsel, informally requested that the district attorney disclose all of the information mentioned in the mandatory and discretionary disclosure provisions found in Rule of Criminal Procedure 305(B). Some of the evidence requested, including samples of the drugs seized from appellant's house, and the arrest record and other background of the confidential informant was not disclosed. Appellant filed a motion to prohibit the introduction of the evidence not disclosed pursuant to the discovery request, and to bar the testimony of the confidential informant because of the Commonwealth's failure to disclose all the evidence requested. For reasons not apparent in the record, the court did not rule on this motion. Trial commenced and the evidence and testimony not disclosed pursuant to appellant's Rule 305 request was admitted. The jury

returned guilty verdicts on nine of ten counts on March 27, 1989.

The highly irregular post-verdict stage of the case ensued. On April 6, 1989, appellant filed extensive post-verdict motions entitled "Motion for a New Trial and In Arrest of Judgment," Motion for a New Trial and In Arrest of Judgment Based on After Discovered Evidence." On April 7, without the benefit of a hearing or the submission of briefs by either party, the trial court summarily denied appellant's post-verdict motions by way of a brief order without explicitly addressing any of the claims raised, and scheduled sentencing for the following Monday, April 10, 1989. At that time, the judge sentenced appellant to an aggregate term of four to eight years imprisonment. On April 11, appellant filed both a motion to modify sentence, and a notice of appeal to this court. Thereafter, on May 3, 1989,

appellant filed his concise statement of matters complained of on appeal, from which many of the issues raised in the post-verdict motions were omitted.[1] On June 9, 1989, the trial court denied appellant's motion to modify sentence in part because, notice of appeal having been filed, jurisdiction was no longer in the court of common pleas. In fact, the appeal had been docketed by the prothonotary of the superior court on May 9, 1989. Finally, on August 29, 1989, the trial judge filed his opinion sur Rule of Appellate Procedure 1925 in which he disposed of all of the claims raised in appellant's statement of matters

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[1]One of the claims found in the post-verdict motions but not in the concise statement of matters complained of on appeal, or in the appeal itself, involved an allegation that the trial judge, when he was district attorney of Columbia County participated in the prosecution of an earlier drug case against appellant.

complained of on appeal. The appeal is now ready for our review.

First, appellant contends that the trial court failed to follow the proper procedures in considering his post-verdict motions. He contends that his right to due process was thereby violated. Post-verdict motions are filed pursuant to Rule of Criminal Procedure 1123 which provides in relevant part:

> (a) Within ten (10) days after a finding of guilt, the Defendant shall have the right to file written motions for a new trial and in arrest of judgment. . . . Argument, a hearing, or both shall be scheduled and heard promptly after such motions are filed, and only those issues raised and the grounds relied upon in the motions that are stated specifically and with particularity may be argued or heard.

Pa.R.Crim.P. 1123. The rule appears to require either argument, a hearing, or both. The trial court provided neither. In its order dismissing the post-verdict

motions, filed the day after the motions were filed, the trial court stated:

> Upon consideration of the Defendant's motions for new trial and in arrest of judgment and upon Defendant's motion for new trial and in arrest of judgment based on after discovered evidence, the Court finds that the matters raised prior to trial were properly considered by the Court, and sustains the orders previously entered in this matter. The Court further finds that there was no error in the trial of the case, that the matter was fairly and properly tried by competent counsel, and that the motions for new trial and in arrest of judgment based on after discovered evidence is also without merit, and therefore, the court makes the following [order denying the motions].

We find this statement does not adequately dispose of the issues raised in appellant's post-trial motions. This is particularly true because the statement was made only one day after the motions were filed, and without the benefit of hearing, briefs or argument to examine issues raised in the motions. The trial

judge never properly disposed of the issues found in the post-verdict motions because many of them were not raised in the statement of matters complained of on appeal. It was to the allegations found in this later document that the trial court addressed its opinion sur Rule 1925. The issues raised in post-trial motions must be addressed by the trial court, otherwise the purpose of requiring the filing of post-trial motions would be thwarted. Commonwealth v. Norris, 256 Pa. Super. 196, _____, 389 A.2d 668, 669 (1978) (purpose of post-trial motions is to give the trial court the opportunity to correct its mistakes). We, therefore, vacate the judgment of sentence and remand to give the trial judge the opportunity to properly consider appellant's post-verdict motions. This will require that the court schedule a hearing or oral argument, or

permit the parties to supply briefs in support of their positions.

We also find merit in appellant's claim that the procedure followed for his sentencing was fatally flawed in that no presentence report was ordered, nor was its absence explained by the court pursuant to Pa.R.Crim.P. 1403(2)(a) which reads as follows:

> (2) The sentencing judge shall place on the record his reasons for dispensing with the pre-sentence investigation report if the court fails to order a pre-sentence report in any of the following instances:
>
> (a) where incarceration for one year or more is a possible disposition under the applicable sentencing statutes;

This court has remanded for resentencing in other cases in which the requirement of the Rule has been ignored. See, Commonwealth v. Carter, 336 Pa. Super. 275, 485 A.2d 802 (1984); Commonwealth v. Bryner, 285 Pa. Super. 305, 427 A.2d 236

(1981). Herein, the trial court gave no indication as to why he chose not to follow the Rule. Therefore, remand is in order for sentencing purposes as well as appropriate consideration of post-verdict motions.

Appellant's final claim is that the court erred in permitting certain evidence and the testimony of a particular witness when the Commonwealth failed to supply necessary information concerning the evidence and testimony during the discovery process pursuant to Rule of Criminal Procedure 305. Specifically, appellant claims that the Commonwealth wrongly withheld (1) laboratory reports of analysis of the drugs seized from appellant's home; (2) the actual drugs admitted into evidence at trial; (3) the criminal record of the Commonwealth's confidential informant who testified at trial. Appellant argues that this

evidence was subject to the mandatory disclosure requirements of Rule 305(B)(1). Accordingly, appellant argues that the remedy provision found in Rule 305(E) should be applied to exclude the evidence and testimony related to the undisclosed items.

The Commonwealth argues in response that appellant failed to object to the admission of the evidence and testimony related to the undisclosed items, and therefore, waived any objection to the admission to the evidence pursuant to Rule 305(E). In fact, counsel for appellant objected as soon as the first Commonwealth exhibit was introduced. Exhibit 1 was an evidence envelope containing a packet of cocaine and a laboratory report. N.T. March 22, 23, & 27, 1989 at 22. When more of the drugs seized from appellant were introduced, counsel for appellant again objected on the same basis. Id. at 30,

31. See also, id. at 38, 145. In all of these places in the record, appellant's counsel objected to the admission of evidence on the basis of failure to disclose pursuant to Rule 305.[2] When viewed in conjunction with appellant's pre-trial motion to suppress for failure to disclose, we must conclude that the appellant did not waive the issue.

Having determined that the issue was not waived, we must next determine whether the circumstances required appellant's requested remedy of suppression of the related evidence and testimony. Rule 305(E) provides in relevant part:

> **E. Remedy.** If at any time during the course of the proceedings it is brought to the

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[2]None of the aforementioned trial objections concerned the testimony of the Commonwealth's confidential informant. We therefore conclude that this issue, as it relates to the Commonwealth's failure to disclose information about the confidential informant is waived.

> attention of the court that a party has failed to comply with this rule, the court may order such party to permit discovery or inspection, may grant a continuance, or may prohibit such party from introducing evidence not disclosed, . . . or it may enter such other order as it deems just under the circumstances.

We cannot conclude that the trial court erred in permitting the admission of the actual drugs seized or the laboratory reports relating to those drugs, because appellant had an opportunity to examine the evidence at trial. There was nothing surprising or unusual about the drugs or the laboratory reports that would have aided in appellant's defense had that evidence been disclosed earlier. Moreover, appellant conceded that the evidence seized was drugs, so that the issue was not even subject to dispute at trial. For all of the foregoing reasons, we will not overturn the

trial court's decision to admit the evidence over appellant's objection. This decision was sanctioned by Rule 305(E) as it was "just under the circumstances."

Judgment of sentence is vacated, and the case is remanded for proceedings consistent with this memorandum. Such proceedings are to be held within 30 days of this Order. Jurisdiction is retained. Jurisdiction of panel is retained.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PA
	:	
vs.	:	NO. 1120PHL1989
	:	
	:	
FRANK J. ARENELLA, JR., Appellant	:	

Appeal from the Judgment of Sentence April 10, 1989 in the Court of Common Pleas of Columbia County, Criminal, No. 44 of 1988.

BEFORE: CIRILLO, P.J., and MONTEMURO and MONTGOMERY, JJ.

FILED: Sep 10, 1991

MEMORANDUM:

This case comes to us after having been remanded to the Court of Common Pleas of Columbia County. In April of 1989, appellant was convicted of various drug offenses for which he was sentenced to four to eight years imprisonment. On direct appeal to this court,[1] we determined

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[1] Commonwealth v. Arenella, --- Pa. Super ---, --- A.2d --- (Memorandum filed at No. 01120 Philadelphia 1989, October 18, 1990).

that because of irregularities in the procedures followed by the trial court in reviewing appellant's post trial motions, and in conducting the sentencing hearing,[2] remand to the trial court was necessary so that these proceedings could be properly held. The trial court has now filed an Opinion and Order directed at those

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[2]The trial court had failed to order the presentence report required by Pa.R.Crim.P. 1403(2)(a). On remand, the report was obtained, and the court reimposed the identical sentence. Appellant then filed a Motion for Modificaton claiming that the sentence was improper because no guideline form was included, nor any statement as to why the sentence deviated from the guidelines.

These issues, which were available to appellant previously, were not properly raised, as appellant's original Motion to Modify was filed after the trial court had already been divested of jurisdiction by the filing of the Notice of Appeal. Moreover the Motion to Modify made no claim of any guidelines problems. We decline to address any now.

issues it neglected to address initially, namely, the trial court's failure to recuse, although the judge had formerly prosecuted appellant on an unrelated drug case, and the trial court's refusal to grant a new trial on the basis of after-discovered evidence.

After thoroughly reviewing the record, we find that the trial court has adequately addressed and properly disposed of the issues involved. Accordingly, we affirm on the basis of the trial court's Opinion.

Judgment of sentenced affirmed.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT
	:	OF COMMON
	:	PLEAS OF THE
	:	26TH JUDICIAL
vs.	:	DISTRICT
	:	COLUMBIA COUNTY
	:	BRANCH, PA
FRANK ARENELLA, JR.,	:	CRIMINAL DIVISION
Defendant	:	
	:	NO. 44 of 1988
	:	
	:	IN THE SUPERIOR
	:	COURT OF PA
	:	
	:	NO. 01120
	:	PHILADELPHIA

SCOTT W. NAUS, ESQUIRE, Attorney for the Commonwealth
MICHAEL R. LYNN, ESQUIRE, Attorney for the Defendant

OPINION

November 7, 1990, Keller, J.

Per Order and Opinion of the Superior Court dated October 18, 1990 this Court did grant all parties an opportunity to brief and argue Defendant's motions for a new trial.

At argument Defendant stipulated on the record that there were only two issues not addressed in our Opinion of August 29,

1989, disposing of his statement of matters complained of on appeal filed pursuant to Pa.R.A.P. 1925. First, the question of recusal and second the supplemental motion for a new trial on the basis of after-discovered evidence.

Defendant did request and was granted the right to file a brief arguing the remaining issues for reconsideration by us. We have reviewed this brief and after considering the contentions raised therein do conclude that our disposition of these issues was proper in our opinion of August 29, 1989. Without further comment, we do hereby incorporate and adopt that opinion.

I

The first of the remaining matters, is Defendant's assertion that I errored by not granting his "Motion for Recusal" by virtue of the fact that I was District Attorney at the time he was prosecuted for an unrelated drug violation in 1977.

Defendant's counsel at argument candidly admitted that he never filed a formal motion requesting recusal. Therefore, his reference in paragraph 4(i) to Defendant's "Motion for Recusal" is in error. We have reviewed the transcript and find no verbal request that I be disqualified for any reason.

Defendant raised this issue of recusal in his post-verdict motion. A party must assert specific grounds to support a motion of recusal before the trial has been completed and the jury verdict recorded. Defendant has waived his right to have the judge disqualified by waiting to raise recusal in his post-verdict motion, for the first time. Reilly by Reilly v. SEPTA, 489 A.2d 1291 (1985).

Even though Defendant's motion to recuse was not timely and must be deemed waived it will be dismissed on its merits.

Defendant had the burden of producing evidence to establish bias, prejudice or unfairness requiring recusal. Commonwealth v. Berrigan, 501 A.2d 226 (1985).

The only evidence of bias, etc., alleged was the fact that I had been District Attorney when Defendant was tried on unrelated charges eleven years prior to the instant trial. I feel strongly that merely because I had prosecuted Defendant eleven years before on an unrelated charge that I possessed no bias nor prejudice against him. Furthermore, I was insulated from fact-finding by the jury and as noted possessed no predisposition of bias. See: Commonwealth v. Johnson, 291 Pa. Superior Ct. 566 (1981). In the absence of a showing of bias no recusal is mandated soley because of prior prosecutorial participation in an unrelated matter. Compare: Commonwealth v. Darush, 501 Pa. 15, 459 A.2d 727 (1983) wherein recusal

was denied even where the Judge as District Attorney had been involved in the same prosecution.

We submit that the trial record does not reveal, nor has counsel called our attention to any predisposition or bias. The matter was fairly tried and the guilty verdict based solely upon the jury's fact-finding. Therefore, had Defendant timely moved for recusal we would have refused.

II

Defendant requests a new trial alleging that it is warranted by after-discovered evidence.

A new trial in a criminal case may be awarded only if the after-discovered evidence meets all the following conditions:

1. It was discovered after trial and could not have been obtained <u>at or prior</u> to the conclusion of the trial by the exercise of reasonable diligence.

2. It is not merely corroborative or cumulative.

3. It will not be used solely for the purpose of impeaching the credibility of a witness.

4. It is of such a nature that it would likely compel a different verdict. Commonwealth v. Bonaduce, 226 Pa. Superior Ct. 517 (1973).

Defendant alleges that one Robert Reeder would testify at the new trial, if granted, that on July 4, 1987 as he rode past Defendant's home he observed lights on within the house. On that date Defendant was away on vacation. Defendant argues that Reeder's testimony would bolster his defense that the drugs seized by the police were "planted" in his home.

Unfortunately, this testimony, by Reeder, fails to satisfy the first, second and fourth requirements of "after-discovered evidence."

Reeder admitted that he mentioned his observations to Defendant prior to trial and to counsel at the completion of his summation. (Sentencing hearing pages 10 and 11). The purported after-discovered evidence was, therefore, known to Defendant before trial and counsel prior to the conclusion of trial.

Due diligence was not exercised by counsel when he became aware of Reeder's testimony. Counsel should have immediately made the court aware of the development, but instead chose to wait and take his chances on the verdict. See: Commonwealth v. Miller, 465 Pa. 458, 463 (1976).

In this same regard, Defendant's failure to make the existence of Reeder's testimony known to counsel and court cannot be excused by his assertion that he "forgot." Defendant was well aware prior to trial, that his defense was predicated on his contention that the drugs had been

"planted" in his house. His forgetfulness does not demonstrate the exercise of reasonable diligence required by the first condition.

Defendant in his own motion characterizes the evidence as corroborative. At argument he agreed that paragraph 9 of his motion was incorrect and substituted corroborative for collaborative. As a result of this correction paragraph 9 refers to the evidence as "significant corroborative testimony." Again in paragraph 11, Defendant alleges that Reeder's testimony would be "significant as corroborating testimony."

The second requirement that the evidence in order to qualify as "after-discovered evidence" must not be merely corroborative has by Defendant's own admission not been met.

Finally, we are not persuaded that Reeder's testimony even if heard by the

jury would likely compel a different verdict. As a result the fourth test is also lacking.

For the foregoing reasons we do hereby reaffirm our order of April 7, 1989 denying Defendant's motions for a new trial and in arrest of judgment.

ORDER

AND NOW, this 7th day of November, 1990 Defendant is directed to appear in court at 9:00 AM, November 15, 1990 for resentencing in accordance with the Pennsylvania Superior Court Order of October 18, 1990.

BY THE COURT:

/s/G. C. Keller

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

April 22, 1992

Joseph M. Devecka, Esquire
111 Sowers Street, Suite 600
State College, PA 16801

RE: COMMONWEALTH OF PENNSYLVANIA
v. Frank ARENELLA, JR.,

No. 308 M.D. Allocatur 1991

Dear Petitioner:

This is to advise that the following order has been endorsed on the Petition for Allowance of Appeal in the above-captioned matter:

"04/21/92
Petition Denied.
Per Curiam"

Sincerely yours,

/s/Shirley J. Phipps
Office of the
Prothonotary
Supreme Court of
Pennsylvania

c: Cirillo, Montemuro, Montgomery, JJ.
Superior 1120PHL89
Keller, Gailey C., J. Columbia
Criminal 44of1988
Rudolf L. Catalan, Esquire

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent	:	No. 308 Middle District Allocatur Docket 1991
v.	:	
FRANK ARENELLA, JR., Petitioner	:	Petition for Reconsideration

ORDER OF COURT

PER CURIAM

AND NOW, to wit, this 8th day of October, 1992, the Petition for Reconsideration filed in the above matter is hereby denied.

A TRUE AND CORRECT COPY
ATTEST: 10/08/92

/s/Shirley J. Phipps
ASST. CHIEF CLERK

Frank Arenella is for the first time since he was arrested represented by new counsel. Michael Lynn, Esquire represented Mr. Arenella during his entire preceding trial and direct appeal. This is now the point at which present counsel must raise allegations of ineffectiveness. Many of these allegations are apparent from the record. This appeal is largely based on this Honorable Court's Opinion in Commonwealth v. Fassett, 496 Pa. 529, 437 A.2d 1166, 1168 (1981).

Prior counsel was ineffective in four (4) areas. First, he failed to reserve for appeal the failure to provide information concerning the prior record, current and past plea bargains and records of any outstanding charges against the Informant, Robert Builder. Second, he was ineffective in failing to present the testimony of a

college professor who saw lights in Mr. Arenella's house while Mr. Arenella was on vacation in support of Mr. Arenella's theory that the illegal drugs were placed in his house while he was on vacation. Third, prior counsel was ineffective in failing to timely move to recuse the Trial Judge based on the Trial Judge's blatant disregard of Mr. Arenella's due process rights. These first three (3) instances of ineffectiveness prejudiced Mr. Arenella by leading to his conviction and sentencing after summary dismissal of his Post-Verdict Motions and sentencing to four to eight (4-8) years without a presentence report.

Fourth, prior counsel failed to allege and preserve issues that the evidence at trial was insufficient to sustain a verdict to <u>possession with intent to</u> deliver two (2) tablets of L.S.D. (Count 6) and possession with

intent to deliver one-half (½) gram of methamphetamine (Count 7).

At trial, the Commonwealth evidence established that at his own home, Mr. Arenella twice delivered cocaine to Informant Robert Builder. These deliveries were of 6.7 grams of cocaine on June 22, 1987 and 2.2 grams of cocaine on July 20, 1987. Following the July 20 delivery, a search warrant was obtained and a search of Mr. Arenella's home resulted in the seizure of 774.5 grams of marijuana, two (2) tablets of L.S.D., 0.5 grams of methamphetamine, 48 Tylenol - three (3) tablets containing codeine, 36.5 grams of cocaine and various items of drug paraphernalia. Mr. Arenella was arrested.

Arraignment was waived in this case effective March 31, 1988 and an Information was then filed on April 4, 1988. Almost one (1) year later on March 16, 1989, prior counsel filed his only Discovery

Motion. He filed a Motion to Compel Discovery, Prohibit Evidence and Bar Testimony. This motion was not disposed of before trial which began six (6) days later.

Frank Arenella testified that (Informant) Robert Builder came to Frank's home on June 22, 1987 and Mr. Builder found out that Frank Arenlla and family were leaving that very day for a Florida vacation, R.R. Vol. II, page 252. Frank also testifed that while he was on vacation someone (most likely, Robert Builder) put the drugs found in the July 20, 1987 search in his house, R.R. Vol. II, page 268. Frank identified Robert Builder as a bookie, R.R. Vol. II, pp. 246 and 254. Further, Mr. Arenella denied delivering cocaine to Robert Builder on either June 22 or July 20, 1987, R.R. Vol. II, pp. 252-253, 256-257.

The jury trial which began on March 22 concluded (Easter Holiday Intervening, March 24 - 26, 1989) on March 27, 1989 when the jury found Mr. Arenella guilty on all counts except Count 7 (48 Tylenol - 3 tablets containing codeine). On April 6, 1989, prior counsel filed two (2) motions: 1) A Motion for a New Trial and Arrest of Judgment; and 2) A Motion for a New Trial and Arrest of Judgment based on After Discovered Evidence.

The Superior Court described what occurred next as, "The highly irregular post verdict stage of the case . . . " Memorandum Panel Opinion filed October 18, 1990, page 24 herein. The Trial Court, without hearing, argument or briefs, denied in an Order both Post-Verdict motions the next day, Friday, April 7, 1989, and in the same document Ordered Mr. Arenella to be sentenced Monday, April 10, 1989, see Order of Court [Trial Court]

dated April 7, 1989, attached hereto at page 16.

A Notice of Appeal was filed, followed by an Order to file a Pa.R.A.P. No. 1925(B) Concise Statement of Matters Complained of on Appeal. Prior counsel filed said statement alleging error in summarily ruling on Post-Verdict Motions, Sentencing without a Pre-Sentence Investigation, and deciding Post-Verdict Motions in one day allowing the Defendant the weekend to prepare for trial, these three (3) grounds were raised following the treatment of Post-Trial Motions by the Trial Court. Prior counsel also included seventeen (17) allegations of errors requiring a new trial, but did not allege insufficient evidence to support an intent to deliver two (2) L.S.D. tablets (Count 6) or 0.5 grams of methamphetamine (Count 7); merger of Counts 1 and 2 and Counts 3 and 4 for sentencing, the issue of failure

to recuse, or the issue of after discovered evidence, see Supplemental R.R., pp. 18b-22b.

Trial Court then filed an Opinion on the issues raised on appeal dismissing all the matters raised in the concise statement, see August 29, 1989 Trial Court Opinion attached hereto at pp. 71-23.

Superior Court held that the Trial Court may not summarily dismiss Post-Trial Motions, but must allow hearing and/or argument and/or briefs. It was noted that all of the issues raised in Post-Trial Motions were not addressed in the Trial Court's Opinion because they were not all raised in the 1925 Concise Statement of Matters Complained of on Appeal. Therefore, the Superior Court remained (jurisdiction retained) for a proper determination of Post-Trial Motions, and vacated Mr. Arenella's sentence with instructions, see Superior Court

Memorandum Opinion, October 18, 1990, attached hereto, pp. 27-28 and 32.

The Superior Court (Panel) in its October 19, 1990 Opinion continued to rule on prior counsel's discovery issues. These issues were failure to provide lab reports, permitting the introduction of the drugs purchased and seized and permitting Robert Builder's testimony because no criminal record, plea bargain and outstanding crimes known to the prosecutor were provided. The Superior Court held that there was no error concerning the lab report and drugs placed into evidence because there was nothing unusual about the lab reports or drugs to surprise prior counsel, see October 18, 1990 Superior Court (Panel) Memorandum Opinion attached hereto, pp. 28-32. Prior counsel waived all issues regarding Robert Builder's (Informant) testimony by failing to object to his testimony at trial, see

R.R. Vol. II at page 61 and Superior Court October 18, 1990 Opinion attached hereto at p. 31, Note 2.

After Remand (Jurisdiction Retained), the Trial Court held in its Opinion that only two (2) issues remained to be addressed because all other issues had been addressed as raised in the Concise Statement of Matters Complained of on Appeal, see Opinion of Trial Court of November 7, 1990, attached hereto at p. 35. These issues were a new trial based on either failure to recuse or after discovered evidence. Present counsel notes that the Motions in Arrest of Judgment were not <u>ever</u> considered by Trial Court in its August 29, 1989 or its November 7, 1990 Opinions. They were raised in a Motion to Arrest Judgment by prior counsel, see Supplemental R.R. pp. 10b-11b, (raised) and the above cited August 29, 1989 and November 7, 1990 Trial

Court Opinions attached hereto at pp. 17-23 and 35-40.

In its November 7, 1990 Opinion, Trial Court holds that refusal to recuse was proper because even if the Motion to Recuse had been timely filed before trial no per se prejudice is shown because Mr. Arenella was previously prosecuted by the Trial Judge.

The Motion for a New Trial was denied because the Trial Court held that prior counsel and Defendant knew of the evidence before the trial was over and the evidence was merely corrobora-tive and would not likely compel a different result, see Trial Court November 7, 1990 Opinion attached hereto at pp. 35-40.

The Superior Court in a September 10, 1991 Memorandum Opinion attached hereto at pp. 33-34, affirmed the Trial Court Opinion of November 7, 1990, which affirms sentence. The Superior Court then denied

an Application for Reargument filed September 24, 1991 by an Order filed on November 8, 1991.

The issue of ineffectiveness of prior counsel (there has been only one, Michael Lynn, Esquire) may now be raised if this is the first time Mr. Arenella has been represented by new counsel. This Honorable Court has so held in Commonwealth v. Fassett, 496 Pa. 529, 437 A.2d 1166, 1168 (1981). There can be no doubt that Michael Lynn, Esquire represented Mr. Arenella up until the Application for Reargument which Mr. Lynn sent to the Superior Court was denied on November 8, 1991. Now, a timely Petition for Allowance of Appeal is being filed by new counsel. There is a requirement that in order to establish claims of ineffectiveness of prior counsel an offer to prove at an appropriate hearing sufficient facts to permit a reviewing court to conclude that

trial (and direct appeal) counsel may have, in fact, been ineffective.

Present counsel has been unable (at this point) to find, even in the files of prior counsel, a copy of Volume One of the Reproduced Record.[1] Volume Two of the Reproduced Record together with a Supplemental Reproduced Record of the Issue of Ineffectiveness are being included. Volume One of the Reproduced Record will be located soon and forwarded. Volume One contains the Notes of Testimony of Mr. Arenella's trial. The Supplemental Reproduced Record contains the documents of record which will permit an examination

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[1]Efforts have been instituted to locate Volume One of the Reproduced Record in the files of the District Attorney of Columbia County, but as yet none has been found. Documents such as the Information have been found that are renumbered 22a-25a as if they were part of the Reproduced Record Volume One. These documents have been included in a Supplemental Reproduced Record numbered 1b - 38b, so it may easily be distinguished.

of the issues of ineffectiveness to comply with this Honorable Court's directive in Commonwealth v. Pettus, 492 Pa. 558, 424 A.2d 1332, 1335 (1981).

The first allegation of ineffectiveness concerns failure to raise the issue of insufficient evidence to show an intent to deliver two (2) tablets of L.S.D. and 0.5 grams of methamphetamine, Counts 6 and 7 respectively, see Counts 6 and 7 of the Information, Supplemental R.R., p. 28b-29b.

The testimony at trial was glaringly insufficient to support an intent to deliver either the two (2) tablets of L.S.D. or the one-half (½) gram of methamphetamine. All testimony concerned delivery of and offers of cocaine.

In fact, the following exchange occurred at trial:

Attorney Lynn, Defense Counsel

> Question: Did he [Informant Robert Builder] tell you when

you talked with him that he had knowledge of Mr. Arenella or in fact engaged in activity as regard to other controlled substances other than cocaine?

Answer: No, sir.

Question: Was there any suspicion that Mr. Arenella, outside of what Mr. Builder was telling you, had ever been engaged in any activity regarding possession of L.S.D. or any of those other substances you found? [Emphasis added]

Answer: Yes, sir.

Question: Who did you get that information from? Before you tell me what the information is.

Answer: From several sources, one, Agent Byerly from our Region Four office.
Cross Trooper Howal, R.R. pp. 151-152 Vol. II.

The informant in regard to the two (2) L.S.D. tablets and 0.5 grams of methamphetamine testifies as follows:

Michael Lynn, Defense Counsel

Question: . . . were you ever involved in any transaction with Mr. Arenella as regard to the L.S.D.?

Answer: No.

* * *

Question: Methamphetamine?

Answer: No.
Cross of Robert Builder, R.R.
Vol. II, pp. 81-82.

The intent to deliver controlled substances may be inferred by the actions of the Defendant (selling, offering for sale) or by the quantity found or by how it is packaged. The fact that two (2) tablets of L.S.D. and 0.5 grams of methamphetamine are found in a home with large quantities of cocaine and marijuana is insufficient to infer an intent to deliver the two (2) L.S.D. tablets and one-half (½) gram of methamphetamine. This is especially true when there is affirmative testimony from Commonwealth witnesses that no discussions of L.S.D. or methamphetamine took place and the only information heard by Trooper Howal concerned possession of L.S.D.

Therefore, Michael Lynn was ineffective in failing to raise and preserve the issue of the sufficiency of the evidence to establish an intent to deliver in Counts 6 and 7. Mr. Arenella is prejudiced by being convicted of these counts when, in fact, the evidence is insufficient to support a conviction. Sentence on Counts 6 and 7 must be arrested and this issue be remanded to Trial Court for its initial determination. [Of course, in the interest of judicial economy this Honorable Court could simply vacate judgment and discharge Mr. Arenella on Counts 6 and 7.]

Prior counsel was also ineffective in failing to argue on appeal that the Trial Court (by denying all Post-Verdict Motions one day after they were filed without argument, hearing or briefs and then sentencing the next business day without a presentence investigation) demonstrated

bias against Mr. Arenella as grounds for recusal.

The summary dismissal of all Post-Verdict Motions the day after they are filed demonstrates bias and a blatant disregard of the due process rights of Mr. Arenella. It shows a desire to reach sentencing that outweighs all considerations of Mr. Arenella's character in reaching an appropriate sentence. Choosing to sentence without a presentence investigation shows the attitude that no consideration of Mr. Arenella's character or social history can possibly mitigate his sentence. Certainly, a significant minority of the lay community would not feel that Judge Keller was acting impartially in sentencing Mr. Arenella. This issue was not remedied by vacating Mr. Arenella's April 10, 1989 sentence and remanding for a November 15, 1990

sentence of exactly the same sentence from the same Judge.

This case is similar to Commonwealth v. Darush, 501 Pa. 15, 459 A.2d 727 (1983). In Darush, a judge who could not confirm or deny making remarks about the Defendant while able to conduct a fair and impartial trial should not resentence the Defendant. Here, an almost single-minded determination to sentence Mr. Arenella resulted in summary dismissal in one day of all Post-Verdict Motions and then proceeding the next business day to sentence without a presentence investigation is highly irregular. Judge Keller has shown such bias toward Mr. Arenella that at a minimum he should not have been permitted to resentence on remand. The sentence of November 15, 1990 should be vacated and the case remanded with instructions to be sentenced by a different judge. The prejudice suffered

by Mr. Arenella at the November 15, 1990 resentencing is that he was resentenced by the same judge who blatantly disregarded his due process rights on April 7 and 10, 1989.

The two (2) remaining issues of ineffectiveness concern trial decisions by trial counsel. First, Michael Lynn, Esquire decided not to use testimony of a Professor Reeder who by testifying to events that occurred while Mr. Arenella was on vacation aided the defense theory of the case. The defense theory was that (most likely) Robert Builder entered Mr. Arenella's home while its occupants were vacationing and planted illegal drugs in Mr. Arenella's home. These planted objects and illegal drugs were later found by State Police. One may regard this defense theory farfetched when it is supported by Mr. Arenella's testimony that he did not have the articles and illegal

drugs in the house when he left on vacation--that someone must have planted them there.

The drugs themselves support this theory, two (2) tablets of L.S.D. and one-half (½) gram of methamphetamine although it still sounds hollow. However, when a college professor testifies that he saw lights on in the basement and upstairs on the Fourth of July, the theory begins to create doubt as to how the illegal objects got in the house. The professor knew that Mr. Arenella would be on vacation--they traditionally attend the same Fourth of July party and the professor knew Mr. Arenella would not be at the party because he would be on vacation. The professor and his wife were so alarmed that they stopped their car and looked more closely, but didn't see anyone. The next night the professor went over to Mr. Arenella's house and the lights were out! This is

the type of evidence that supports the defense strongly. Prior counsel is ineffective in not putting on this testimony which the Trial Court found both he and his client knew before the end of the trial, see Supplemental R.R. pp. 13b-17b and November 7, 1990 Trial Court Opinion, attached hereto at p. 39. Mr. Arenella must be given a new trial at which time he may present the professor's testimony in support of his defense theory.

Prior counsel neglected to object to the testimony of Robert Builder on the grounds that he had not been provided with criminal record information, plea bargain information and information on outstanding charges against Robert Builder for crimes in Columbia County. Therefore, this issue was waived on appeal, see Opinion of the Superior Court Memorandum of October 18, 1990, attached hereto, p. 31, Note 2.

Robert Builder may certainly have had outstanding charges against him. Trooper Howal admitted on cross-examination that Robert Builder had been investigated for six or seven months before his arrest on June 12, 1987, R.R. Vol. II, p. 120. Trooper Howal had received authorization to intercept Mr. Builder's conversations concerning drug activities on the 3rd of April, over two (2) months before he was arrested, R.R. Vol. II, pp. 175-176. The strong suspicion that Mr. Builder had not been charged with all of the crimes he committed because he cooperated is emphasized by the Commonwealth at trial. Mrs. Pealer-Wenzel asks Builder interesting questions. She asked if Builder had ever been arrested or charged in Columbia County. If defense counsel is not made aware of any crimes which Builder has not been charged because he cooperated, Builder may not be impeached. A bookie

whose phone conversations have been intercepted may have outstanding charges that may be influenced by the Columbia County District Attorney. Builder may clearly have been involved with a conspiracy to buy cocaine in Columbia County and sell it in Northumberland County.

Without proper disclosure of the entire plea bargain and a review of reports to see what outstanding crimes there are against Mr. Builder, his full reason for testifying favorably for the Commonwealth in hopes to help himself is not apparent. This Honorable Court should remand for a hearing to determine the unresolved crimes against Robert Builder that would have been a motive for him to plant various drugs in Mr. Arenella's home while he was on vacation. This argument is supported by this Honorable Court's

decision in Commonwealth v. Evans, 511 Pa. 214, 512 A.2d 626 (1986).

Respectfully submitted,

/s/Joseph M. Devecka

Attorney for Frank Arenella, Jr.

111 Sowers Street,
State College, PA 16801
(814) 234-5227

Attorney ID #29938

REQUEST FOR RECONSIDERATION

This request for reconsideration is made because counsel is aware for the first time of this Honorable Court's Opinion and holdings in Commonwealth v. Moose, _____ Pa. _____, 602 A.2d 1265 (1992). This Honorable Court's Opinion in Moose, supra., did not exist prior to the writing of the instant application for appeal and was published in the April 17, 1992 advance sheets to be read by defense counsel on April 28, 1992, some five (5) days after receipt of the instant denial of appeal.

The denial of the Petition for Allowance of appeal was filed April 22 and service was received on April 23, 1992.

In Moose, this Honorable Court for the first time extended its holdings in Commonwealth v. Wallace, 500 Pa. 270, 455 A.2d 1187 (1983) and Commonwealth v. Evans, 511 Pa. 214, 512 A.2d 626 (1986).

This extension of these previous holdings specifically deals with the failure of the Commonwealth to disclose an "understanding" with a key witness requiring a new trial. Reconsideration is requested because a major issue in this case is the failure of the Commonwealth to disclose an old Northumberland County understanding (plea bargain) and any new or Columbia County understanding (plea bargains) that may constitute a motive to testify favorably for the Commonwealth or plant controlled substances in Appellant's home while he was on vacation.

In both Wallace and Evans, the focus of prior opinions was either failure to disclose prior criminal records resulting in uncorrected perjury concerning a key witness's past record, Wallace, supra., 455 A.2d 1190-1193, or failure to permit cross-examination concerning outstanding unresolved criminal charges for which a

witness could seek favor from a prosecutor through his testimony, Evans, supra., 512 A.2d at 631.

In Moose, this Honorable Court focused in large part on failure of the Commonwealth to disclose the understanding or plea bargain of the witness requiring a new trial, making the opinion in Moose an intervening circumstance of controlling effect.

In Moose, the Commonwealth allowed testimony by the jailhouse "monsignor" (so named because of the number of inmate confessions he allegedly heard) without revealing that he was a paid informant (paid through lenient sentencing recommendation).

Here, the Commonwealth did not reveal any understanding with Mr. Builder, still on Northumberland County parole, that would require his testimony as part of a Northumberland County understanding,

R.R. pp. 68a, 111a, 114a, 117a-118a. In fact, Petitioner, Frank Arenella, is the only person Mr. Builder actually testified against, R.R. p. 114a. No effort was made at trial to show that the Northumberland deal could or would result in his prosecution for violating its terms, see Commonwealth v. Ward, 493 Pa. 115, 425 A.2d 401, 408 (1981) and Commonwealth v. Shields, 89 Pa. Super. 266 (1226), Commonwealth v. Lord, 230 Pa. Super. 96, 326 A.2d 455 (1974).

Instead, the prosecutor in the instant case was free to present evidence that Mr. Builder had paid his penalty for the drug felony and was merely on parole, R.R. pp. 68a and 175a.

The evidence at trial indicated that just prior to his arrest, Mr. Builder had attempted to purchase cocaine from Petitioner Arenella, R.R pp. 121a and 124a. This means that first a criminal

charge of attempt (to possess with the intent to deliver cocaine) could have been prosecuted in Columbia County. The testimony that Builder purchased cocaine in the past from Arenella, R.R. p. 121a, and together with the amounts Mr. Builder could purchase (¼ ounce), R.R. pp. 158a-159a, support the charge of consipracy to deliver cocaine and/or possess with the intent to deliver cocaine. This crime could have been prosecuted in Columbia County. Yet the prosecutor elicited the following testimony:

> Q. Have any promises been made to you in exchange for your testimony here today?
> A. No.
>
> R.R. p. 68a direct examination of Mr. Builder

Later, the same prosecutor elicited the following:

> Q. Have you ever been charged or arrested or charged with anything in Columbia County?
>
> R.R. pp. 107a-108a, re-direct examination of Mr. Builder.

Even if information about crimes in Columbia County was obtained as a result of cooperation, the jury should have been made aware that Mr. Builder was not prosecuted for these crimes because of his cooperation.

There is sufficient reason already in the record to believe that Mr. Builder's testimony against Petitioner was part of a Northumberland County plea bargain not disclosed and/or a Columbia County bargain not to prosecute if he cooperated.

Instances of ineffectiveness may be raised for the first time in a Petition for Allowance of Appeal, Commonwealth v. Fassett, 496 Pa. 529, 437 A.2d 1166, 1168 (1981).

No argument may be made that cross-examination of Mr. Builder as to his prior record at trial in any way excuses the fact that the jury was not permitted to consider past or present plea bargains or

understandings as a motive for Mr. Builder to 1) testify falsely or 2) as was the defense theory, plant controlled substances in Petitioner Arenella's home while he was in Florida. Builder knew Petitioner Arenella was in Florida, R.R. pp. 71a and 138a.

There can be no question that trial counsel failed to object to not being provided an old or new plea agreement and preserve this objection for appeal. See Opinion of the Superior Court Memorandum of October 18, 1990 attached to Petition for Allowance of Appeal, at p. 31, Note 2.

Therefore, this case must be remanded to conduct an evidentiary hearing to determine the terms of any Northumberland and Columbia County understandings.

If at hearing there is proof of either understanding, the Lower Court must determine if a new trial must be ordered

in light of Moose. The Petitioner is free to appeal an adverse Order.

Respectfully submitted,

/s/Joseph M. Devecka
Attorney for Frank
Arenella, Jr.